92-823

No.

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LUCILLE QUALLS WOODS,

Petitioner,

vs.

DUNLOP TIRE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Whether the Congressional intent of Title VII is frustrated and manifest injustice exists where a federal court applies "a common-law rule of preclusion" to deny a plaintiff with a meritorious claim a full and fair opportunity to be heard where the New York State Division for Human Rights and the Equal Employment Opportunity Commission have found probable cause to believe that the plaintiff had been a victim of discrimination, after an adverse District Court's decision under 29 U.S.C. §185 and §301 of the Labor Management Relations Act.

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IV. OPINIONS BELOW

The United States District Court for the Western District of New York (Elfvin, J.) in a memorandum and Order dated, January 23, 1992, and reproduced at (A-24), the complaint was dismissed.

The United States Court of Appeals for the Second Circuit affirmed the judgment of dismissal by opinion dated August 11, 1992, 1992. _____ F 2d _____ (Slip Op. No. 1604, Docket No. 92-7198, 2d Cir. 1992, reproduced at (A-1).

V. JURISDICTIONAL STATEMENT

The petition seeks review of the decision of the United States District Court, Western District of New York, dated January 13, 1992 and the judgment entered thereon, and the decision of the United States Court of Appeals for the Second Circuit dated August 11, 1992. Jurisdiction of the District Court was based on §706 (f)(3) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2 (a)(1), § 2000e-5 (f)(3), and

28 U.S.C. §§ 1331 and 1343 (a)(3) and (4). (A -).

The issues of frustration of and departure from congressional intent underlying Title VII and decision of an important question of federal common law which has been settled by this Court as well as the inapplicability of federal common law preclusion doctrine were raised in the complaint and the affidavit in opposition to summary judgment in the district (A -), and in the United States Court of Appeals for the 2d Circuit. (A -).

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254 (1).

This petition is filed within ninety (90) days of the date of entry of the decision of the United States Court of Appeals for the Second Circuit.

VI. CONSTITUTIONAL PROVISIONS AND LAW

42 U.S.C.

§ 2000e-2 Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer--

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-5

(a) The Commission is empowered... to prevent any person from engaging in any unlawful employment practice as set for in section 703 or 704 of this title [42 USCS §§ 2000e-2 or 2000e-3].

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved... alleging that an employer, employment agency, labor organization, or joint labor-management....Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission. alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training

programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

VII. STATEMENT OF THE CASE

The Congress has expressed a strong legislative intent to resolve discrimination complaints without litigation by informal means of conciliation.

The preclusive effect of a prior federal judgment is a matter of federal common law. In deciding whether to apply this doctrine to bar a Title VII action, courts must consider whether preclusion would be consistent with Congress' intent in enacting Title VII.

Giving res judicata effect to a judgment in a suit, where collateral estoppel may have been more appropriate, which was dismissed before the plaintiff received a determination on her Title VII charge and a "notice of right to sue" would seriously undermine the statue's administrative mechanism, and would cause, rather than prevent, unnecessary litigation.

Congress intended voluntary compliance to be the preferred means of accomplishing Title VII's goal of eradicating employment discrimination on the basis of race, sex national origin and

religion. To that end it established an administrative process designed to give the Commission as well as State and Local agencies an opportunity to investigate and resolve charges of discrimination before litigation was commenced. Though Congress did not require aggrieved individuals to await the completion of the administrative process before bringing suit, courts have consistently held that persons who elect to do so should not be penalized. The district court's decision and the 2d Circuit's affirmance of that decision in this case effectively penalizes the plaintiff because she did not terminate the administrative proceedings on her Title VII charge when (or soon thereafter) she filed her Labor Management Relations Act (LMRA) action.

It is not unusual for persons who file Title VII charges to also raise claims under other statues. Occasionally, as here, the statute of limitations on other claims will run before administrative proceedings have been completed or a determination was to

existence of reasonable cause tending to show or negate that a person was a victim of discrimination.

In such cases, as here, the only was a charging party would bring her Title VII claim together with her other claims would be by requesting a notice of right to sue before the completion of the administrative process by the Commission and, as here, by the state agency.

The plaintiff should not be required to do the impossible. A hyper-technical and punitive application of res judicata, which totally inapplicable here, should not be tortured and distorted to deny MS. WOODS, a utility worker, a full and fair opportunity to be heard on her meritorious Title VII claim.

VIII. REASONS FOR GRANTING THE WRIT

The Court of Appeals decision leaves the plaintiff, the charging party, in a discrimination case, with the Hobson's choice of either leaving her charges in the administrative process, hoping in

the meantime that there will be no adverse judgment on other claims which will preclude her Title VII claims, or asking for a right to sue letter and abandoning the administrative mechanism in order to join all claims in a single lawsuit.

The Court of Appeals Decision would require the plaintiff to do the impossible. That is, bring her Title VII claim together with her other claims by requesting a "Notice of Right to Sue" before the completion of the administrative process by the E.E.O.C., and where applicable as here, by state or local agencies. Not only would this "feat of impossibility" short-circuit the pre-suit conciliation process intended by Congress but would inevitably result in the litigation of some discrimination claims that could have been voluntarily resolved.

Not only would the foregoing unintended draconian results arise, but further, the shorter six months statue of limitations 29 U.S.C. § 185 of the Labor Management Relations Act would

run before the plaintiff receives a "notice of right to sue" and before the E.E.O.C. and the State Division of Human Rights had made its determination of Probable or Reasonable cause (or No Probable or Reasonable Cause) that the plaintiff had been a victim of discrimination.

Still further, while Congress made it possible for charging parties in Title VII cases who were dissatisfied with proceedings on their charges to cut short the administrative process, Title VII and its legislative history reflects a strong preference for letting the administrative process run its course so that as many charges as possible could be resoled by informal methods of conciliation and persuasion. The Conference Report on the 1972 amendments to Title VII stated, "It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the E.E.O.C.:" 118 Cong. Rec. 7168 (1972). Application of a

preclusion rule which would have the effect of forcing many individuals aggrieved by employment discrimination to forego the full administrative process of investigation, determination, and conciliation by prematurely requesting notices of right to sue would be totally inconsistent with this Congressional purpose. See Great American Fed. S & L Ass'n v. Novotny, 442 U.S. 366, 376 (1979) (plaintiff may not use § 1985(3) to enforce Title VII rights because to do so would "completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress Title VII"); Patterson v. McLean Credit Union, 491 U.S. 164, 180-81 (1989) (interpreting § 1981 so that it will not interfere with Title VII's "elaborate administrative procedure, implemented through the E.E.O.C., that is designed to assist in the investigation of claims of racial discrimination in the work place and to work towards resolution of these claims through conciliation rather than litigation").

The complaint alleges violation of Title VII. The New York State Division for Human Rights and the E.E.O.C. confirmed said violation by issues a determination indicating that the plaintiff, a person nine (9) months from her retirement vesting, had been a victim of discrimination. The complaint was dismissed by the district Court (Elfvin, J.) on motion of the Respondent (A-) and affirmed on appeal to the 2d Circuit, by decision dated August 11, 1992 (A-).

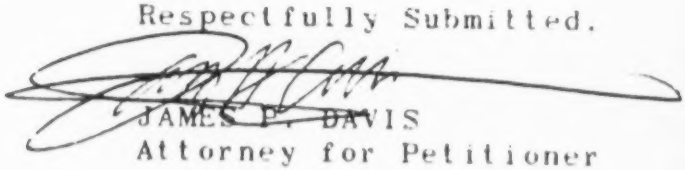
XI. CONCLUSION

Certiorari should be granted because the plaintiff never had a full and fair opportunity to be heard on her Title VII claim though both the New York State Division for Human Rights and the Equal Employment Opportunity Commission found, after the dismissal of her complaint to review an adverse arbitration decision, that she was the victim of discrimination. If the decision of the 2nd Circuit is not reversed, she will remain a person with a meritorious

claim but no remedy. Further, the Congressional intent, which established elaborate administrative procedures with conciliation and voluntary compliance to be the "preferred means" for achieving Title VII's purpose of eradicating employment discrimination based on race, sex, national origin and religion, would be nothing more than an empty promise which an aggrieved plaintiff will rely on to his/her extreme detriment. Finally, certiorari should be granted because the result of this case amounts to manifest injustice, which only this court can correct.

November 4, 1992

Respectfully Submitted,



JAMES P. DAVIS
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1604--August Term, 1991

(Argued May 28, 1992

Decided August 11, 1992)

Docket No. 92-7198

LUCILLE QUALLS WOODS,

Plaintiff-Appellant,

-against-

DUNLOP TIRE CORPORATION,

Defendant-Appellee.

B e f o r e:

MINER, WALKER, and RONEY*
Circuit Judges.

Appeal from summary judgment entered in the United States District Court for the Western District of New York (Elfvin, J.) dismissing Title VII claim

for wrongful discharge based on race and gender as barred by res judicata,

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* Hon. Paul H. Roney, United States Circuit Judge for the Eleventh Circuit, sitting by designation.

plaintiff having failed to assert claim in earlier Labor Management Relations Act suit challenging discharge.
Affirmed.

JAMES P. DAVIS, Buffalo, NY, for Plaintiff-Appellant.

STANFORD G. WILSON, Atlanta, GA (S. Melissa Andrews, Elarbee, Thompson & Trapnell, Atlanta, GA), for Defendant-Appellee.

Samuel A. Marcosson, Attorney, Donald R. Livingston, General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, Equal Employment Opportunity Commission, Office of General Counsel, Washington, D.C., submitted a brief on behalf of Amicus Curiae Equal Employment Opportunity Commission.

MINER, Circuit Judge:

Plaintiff-appellant Lucille Qualls Woods appeals from a summary judgment entered on January 23, 1992 in the United States District Court for the Western District of New York (Elfvin, J.) in favor of defendant-appellee Dunlop Tire Corporation ("Dunlop"). In her complaint, Woods alleged that Dunlop, her former employer, violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) and (k), by terminating her employment on the basis of race and gender, Prior to the filing of the complaint, the New York State Division of Human Rights ("DHR") had determined that there was probable cause to believe that Woods was the victim of discrimination and the Equal Employment Opportunity Commission ("EEOC") had issued a Notice of Right to Sue.

The district court concluded that Woods' Title VII claim was barred by res judicata because she failed to raise the claim in a previous action, in which she alleged that Dunlop's termination of her employment violated

the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Woods now contends that the district court erred in applying res judicata because the LMRA action implicated a claim separate and distinct from Woods' Title VII claim. She asserts also that the Application of res judicata is contrary to the Title VII scheme, since she was awaiting the outcome of administrative proceedings during litigation of the LMRA claim. For the reasons set forth below, we affirm the judgment of the district court.

BACKGROUND

Lucille Qualls Woods was employed by Dunlop from March 1976 until July 1985. Eight months prior to the time that Woods' pension was to vest, Dunlop fired her. Dunlop asserted that it terminated Woods' employment because she was physically unable to perform all of the functions required of her as a "Utility Person," and that she was not qualified for any other available position within the company. Woods, on

the other hand, believed she was fired because she was black and female.

Woods subsequently filed a grievance with her union, United Rubber Cork, Linoleum and Plastic Workers of America, Local No. 135 ("the Union"). In the grievance, rehired. On June 15, 1985, Dunlop denied the grievance, and on July 23, 1985 an arbitrator also denied the grievance.

On July 31, 1985, Woods filed charges against Dunlop with the EEOC and the DHR, alleging that her employment was terminated because of her race and/or sex.

On December 4, 1985, while the administrative proceedings were still pending, Woods filed a complaint against Dunlop and the Union in the United Stated District Court for the Western New York ("Woods I"). In her complaint, Woods alleged that Dunlop violated section 301 of the Labor Management Relations Act ("LMRA:), 29 U.S.C. § 185, by firing her in violation of the terms of the collective bargaining agreement. That action was

commenced shortly before the six-month expire. See DelCostello v. International B hd. of Teamsters, 462 U.S. 151, 172 (1983) (borrowing six-month limitations period from section 10(b), 29 U.S.C. § 160(b)). In Woods I, Woods also asserted that the Union had breached its duty of fair representation during the arbitration. Dunlop and the Union moved for summary judgment, asserting that Woods' termination did not violate the LMRA. By Memorandum and Order dated June 22, 1988, the district court granted summary judgment in favor of Dunlop and the Union and dismissed Woods' complaint.

On August 3, 1988, the DHR found that there was probable cause to believe that Woods had been the victim of discrimination. Two years later, on November 21, 1990, the EEOC concluded its administrative process with respect to the charges and issued a Notice of Right to Sue.

After the issuance of the EEOC right to sue letter, Woods commenced the present action ("Woods II) in the

United States District Court for the Western District of New York. In her complaint, dated February 18, 1991, Woods alleged that Dunlop violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., by wrongfully discharging her from employment with the company on the basis of her race and gender. Thereafter, Dunlop moved for summary judgment on the grounds of res judicata, because Woods could have raised the race and sex discrimination claims she is asserting in Woods II during the pendency of Woods I." By Memorandum and Order dated January 13, 1992, the district court granted summary judgment in favor of Dunlop. In doing so, the district court "conclude[d] that the plaintiff could have raised her Title VII claim in Woods I and that all prerequisites to the application of res judicata have been met."

It is from this grant of summary judgment that Woods now appeals. Woods argues that the doctrine of res judicata "is inapplicable in this case" be-

cause the causes of action in Woods I and Woods II were separate and distinct, and because a Title VII plaintiff has the right to full administrative review prior to instituting a lawsuit, which in this case could not be completed in time to join the Title VII claim with the LMRA claim.

DISCUSSION

> [A] judgment upon the merits in one suit is res judicata in another where the parties and subject-matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end.

Grubb v. Public Utils. Comm'n of Ohio, 281 U.S. 470, 479 (1930); see also Commissioner v. Sunnen, 333 U.S. 591, 597 (1948) ("the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustained or defeat the claim or demand, but as to

any other admissible matter which might have been offered for that purpose'") (quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1877)); Harborside Refrigerated Servs., Inc. v. Vogel, 959 F.2d 368, 372 (2d Cir. 1992); Saud v. Bank of New York, 929 F.2d 916, 919-20 (2d Cir. 1991). Thus res judicata or claim preclusion "prevents a party from litigating any issue or defense that could have been raised or decided in a previous suit, even if the issue or defense was not actually raised or decided." Clarke v. Frank, 960 F.2d 1146, 1150 (2d Cir. 1992); see also Greenberg v. Board of Governors of Fed. Reserve Sys., No. 91-4200, slip op. at 4628 (2d Cir. June 19, 1992); compare Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984) (collateral estoppel or "[i]ssue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided."). "Whether or not the first judgment will have preclusive effect depends in part on whether the same transaction or

connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." NLRB v. United Technologies, 706 F.2d 1254, 1260 (2d Cir. 1988).

Woods first claims that the district court erred in applying res judicata because the causes of action in Woods I and Woods II were separate and distinct. She asserts that "[i]t is abundantly clear that Title VII of the 1964 Civil Rights Act . . . creates a separate and distinct cause of action from that of the LMRA." This argument fails.

The district court correctly determined that the present action involves the same transaction, and therefore the same cause of action, for res judicata purposes. The factual predicates of the employment termination challenged in Woods I and Woods II were the same. Essentially the same underlying occurrence was relevant to both the LMRA and Title VII claims. Both actions cen-

tered around Dunlop's firing of Woods, the reasons for termination, and her employment history, physical limitations, and qualifications. See Pirela v. Village of North Aurora, 935 F.2d 909, 912 (7th Cir.) (prior administrative discharge hearing -- commenced by police department at which it was found that police officer should be fired -- and Title VII claim concerned same transaction; "[a]t their most basic, both suits would require [the discharged officer] to prove that the Village acted in a discriminatory manner when it suspended and discharged [him]. . . Both of [the officer's] claims arose out of the same operative facts"), cert. denied, 112 S. Ct. 587 (1991); Slaughter v. AT & T Info. Sys., Inc., 905 F.2d 92, 93-94 (5th Cir. 1990) (concluding that ERISA suit arising from termination of employment involved same cause of action as previous suit alleging breach of contract and union duty of fair representation); Natta v. Columbia Univ. College of Physicians & Surgeons, No. 91 Civ.

7437, 1992 WL 80760 at *3 (S.D.N.Y. 1992) (applying transactional approach and concluding that Title VII claim of racial discrimination and prior claim for failure to recognize tenure grounded on university statues and employment contract constituted same cause of action for res judicata purposes).

It is this identity of facts surrounding the occurrences which constitutes the cause of action, not the legal theory upon which Woods chose to frame her complaint. See Berlitz Sch. of Languages of Am., Inc. v. Everest House, 619 F.2d 211, 215 (215 (2d Cir. 1980) ("[W]hatever legal theory is advanced, when the factual predicate upon which claims are based are substantially identical, the claims are deemed to be duplicative for purposes of res judicata."); Expert Electric, Inc. v. Levine, 554 F.2d 1227, 1234 (2d Cir.), cert. denied, 434 U.S. 903 (1977); see also Restatement (Second) of Judgments §24(b) & Comments; but see Mitchell v. Board of Trustees of Pickens County Sch. Dist. A, 380 F.

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Supp. 197, 200 (D.S.C. 1973) ("Civil Rights Act creates a cause of action which is separate and distinct from [prior] cause of action under the Equal Protection Clause", although "this Court will probably require plaintiffs to raise both [claims] in the same complaint" in future cases). Thus, it is abundantly clear that the two actions involved the same cause of action for res judicata purposes.

Woods and amicus curiae, the EEOC, argue that res judicata should not apply to situations like the one presented here because application of the doctrine would be inconsistent with the scheme of Title VII. Although we have not previously had occasion to address this issue and while this Court is committed to giving full effect to the Title VII administrative scheme set up by Congress, we are of the opinion that the language and policy of Title VII do not undercut the application of res judicata, and we see no reason militating against application of well-settled claim preclusion principles.

Title VII prohibits employers from discriminating on the basis of race, color, religion, sex or national origin. See 42 U.S. C. §§ 2000e-2(a) through (d). While giving an aggrieved employee access to the federal courts, Title VII requires the employee first to submit a claim to the EEOC. Id. § 2000e-5(f) (1). "If a complainant is dissatisfied with the progress the EEOC is making on his or her charge of employment discrimination, he or she may elect to circumvent the EEOC procedures and seek relief through a private enforcement action in a district court" after 180 days. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 361 (1977). This does not diminish the fact that Congress viewed the prospect of full administrative review as an integral part of Title VII. See e.g. 118 Cong. Rec. 7168 (1972) ("It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC."). However, the fact that

Congress preferred that Title VII disputes be resolved in the administrative forum does not necessarily excuse compliance with general rules governing federal litigation respecting other potentially viable claims.

For instance, in Johnson v. Railway Express Agency, 421 U.S. 454 (1975), the Supreme Court held that the commencement of EEOC proceedings for a plaintiff's Title VII claim did not toll the statute of limitations applicable to the plaintiff's cause of action under 42 U.S.C. 1981. In that case, a Title VII plaintiff waited more than three years before obtaining a right to sue notice and then attempted to bring suit alleging violations of Title VII and section 1981. In finding that the statute of limitations for the section 1981 claim had run, the Supreme Court reasoned that the section 1981 claim could have been asserted by the plaintiff any time during the pendency of the EEOC proceedings. Id. at 465-66. The Court emphasized that the plaintiff could have filed the section

1981 action and then requested a stay of the action pending the outcome of the EEOC administrative proceeding. Id. The Court found that the mere commencement of the administrative proceeding did not entitle plaintiff to special treatment such that plaintiff could sidestep the mandatory time-limitation requirements: "The fact that his slumber may have been induced by faith in the adequacy of his Title VII remedy is of little relevance inasmuch as the two remedies are truly independent. . . . We find no policy reason that excuses [plaintiff's] failure to take the minimal steps necessary to preserve each claim independently." Id. at 466.

In Miller v. United States Postal Serv., 825 F.2d 62 (5th Cir. 1987), the Fifth Circuit held that res judicata applied to bar a claim filed under the Rehabilitation Act of 1973, 29 U.S.C. §§ 794, 794a, reasoning that the claim should have been raised and resolved in plaintiff Miller's earlier Title VII lawsuit because both claims centered

around termination of plaintiff's employment. Id. at 64. Apparently, at the time of the Title VII suit, Miller had not exhausted his administrative remedies with respect to the handicap discrimination claim so he did not assert that claim in the Title VII suit. Id. While the same administrative scheme applied to both the Title VII and Rehabilitation Act claims, see 29 U.S.C. §794a; Morgan v. United States Postal Serv., 798 F.2d 1162, 1164 (8th Cir. 1986), cert. denied, 480 U.S. 948 (1987), the Fifth Circuit nevertheless found that Miller's failure to exhaust his administrative remedies on the Rehabilitation Act claim at the time he asserted his Title VII claim "did not preclude Miller from raising his handicap discrimination claim in the first lawsuit and that the district court correctly dismissed this action on the basis of res judicata." Miller, 825 F.2d at 64. See also Bailey v. USX Corp., 658 F.Supp. 279, 281-82 (N.D. Ala. 1987) (Title VII retaliation claim barred by res judica-

ta where plaintiff failed to assert claim in prior discriminatory termination action, even though at time of termination action EEOC had not completed administrative review of retaliation allegations; there is no "Title VII philosophy, much less statutory language, which would grant [plaintiff] an exception to the rule of res judicata") aff'd, 850 F.2d 1506 (11th Cir. 1988); cf. Pirela, 935 F.2d at 912-913 (Title VII lawsuit barred by res judicata where plaintiff could have alleged discrimination as affirmative defense at prior administrative discharge hearing and state court review, despite fact that plaintiff had filed discrimination charges with EEOC and had not yet been afforded full administrative review); but see Ludwig v. Quebecor Dailies, Inc., 483 F.Supp. 594, 596 (E.D. Pa. 1980) ("plaintiff was correct in not basing her first complaint upon Title VII when she had not as yet even begun to utilize the mechanism it provides. . [P]laintiff's Title VII claim was not 'a ground of recovery. . .

which might have been presented [in the prior suit].' It became so only after plaintiff received her right to sue letter, which was issued only five days before her first suit was dismissed.").

Our analysis leads us to the conclusion that Woods' Title VII action is barred by res judicata. We cannot agree with amicus curiae's contention that this result will put future Title VII plaintiffs to the impermissible "Hobson's choice of either leaving their charges in the administrative process, hoping that in the meantime there will be no adverse judgment on other claims which will preclude their Title VII claims, or asking for a right to sue letter and abandoning the administrative mechanism in order to join all claims in a single lawsuit." While it is true that Woods was forced to bring her LMRA suit prior to completion of the administrative proceedings or else abandon that claim because the six-month statue of limitations on the LMRA claim was about to expire, Woods had two available courses she could

have followed in order to avoid the sting of res judicata. As a first alternative, Woods could have filed her LMRA claim and then sought a stay in the district court pending the outcome of her Title VII administrative proceedings. See Railway Express, 421 U.S. at 465. Once administrative review had become completed, Woods could have then joined her Title VII claim with her LMRA claim by amending the complaint in the LMRA suit. See Fed R. Civ. P. 15(a) (permission to amend pleadings "shall be freely given"). Following this course, Woods' Title VII claim would receive full administrative review, and at the same time she could have preserved any other claims that she may have had arising from the same transaction. We are of the firm opinion that a district court faced with a stay request in this type of situation -- where a Title VII plaintiff is seeking to defer further proceedings in non-Title VII causes of action while pursuing Title VII administrative reme-

dies -- should grant the stay absent a compelling reason to the contrary.

As a second alternative, Woods simply could have filed the LMRA action, sought a right to sue notice on her Title VII claim from the EEOC after 180 days, see Occidental Life, 432 U.S. at 361 ("[a]n aggrieved person unwilling to await the conclusion of extended EEOC proceedings may institute a private lawsuit 180 days after a charge has been filed"), and then amended the complaint in the LMRA suit to include the Title VII claim. Had Woods chosen either of these two alternatives, she could have preserved her Title VII claim. Under the circumstances revealed, we find no reason to excuse Woods' failure to take these minimal steps necessary to preserve each claim independently, and conclude that her Title VII claim is not exempt from the bar of res judicata.

We have considered the remaining arguments and find them to be without merit.

CONCLUSION

For the reasons stated, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LUCILLE QUALLS WOODS,

Plaintiff,

-vs-

DUNLOP TIRE CORPORATION

Defendant.

CIV-91-98E

MEMORANDUM

and

ORDER

The plaintiff commenced this action pursuant to Title VII of the Civil Rights Act of 1986 as amended, 42 U.S.C. §2000e et seq., alleging that the defendant ("Dunlop") wrongfully discharged her on the basis of her race and sex. See Complaint (filed February 20, 1991). Dunlop has presently moved for summary judgment under Fed.R.Civ.P. rule 56, arguing that this action is barred by the doctrine of res judicata. See Notice of Motion and Motion for summary Judgment (filed July 18, 1991).

The plaintiff, a black woman, was employed by Dunlop from March 22, 1976

to July 9, 1985 in various positions. On the later date, she was involuntarily retired from her job as a "utility person" because she was physically unable to perform all of the functions which the job entailed and was not qualified for any other available position. The plaintiff's union, United Rubber, Cork, Linoleum and Plastic Workers of America, Local No. 135 ("the Union"), then filed a grievance contesting her dismissal and demanding reinstatement; such grievance was denied by Dunlop June 15, 1985 and also denied by an arbitrator July 23, 1985.

On December 4, 1985 the plaintiff commenced an action in this Court pursuant to 29 U.S.C. §185, section 301 of the Labor Management Relations Act ("LMRA"), alleging that Dunlop had wrongfully discharged her in violation of the collective bargaining agreement ("the cba") and also that the union had breached its duty of fair representation in handling her arbitration proceeding. Such action,

hereinafter referred to as "Woods I," bore Docket No. CIV-85-1464E. The defendant moved therein for summary judgment and this Court dismissed Woods I June 22, 1988, finding for the union on the grounds that a breach of its duty of fair representation had not been shown and for Dunlop on the grounds that such a showing is an "indispensable predicate" to its claim for any breach of the cba. See Memorandum and Order (dated June 22, 1988) in CIV-85-1464E.

On July 31, 1985 the plaintiff filed charges of discrimination against Dunlop with the Equal Employment Opportunity Commission ("the EEOC") and New York's Division of Human Rights ("the DHR"). On August 3, 1988, shortly after Woods I had been dismissed, the DHR determined that the plaintiff had probable cause to believe she had been discriminated against. See DHR Inter-Office Memorandum, Exh. C to Affidavit of Lucille Q. Woods (sworn to June 31, 1991). On November 21, 1990, nearly five and one-half years

after the plaintiff had filed charges, the EEOC issued its Notice of Right-to-Sue, appended to Complaint. The plaintiff commenced this action February 20, 1991.

It is Dunlop's position that Woods I is res judicata denotes the effect of a valid, final judgment, rendered on the merits, as an absolute bar to a subsequent action between the same parties upon the same cause of action[1] 1B James W. Moore et al., Moore's

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[1]The terms "claim" and "cause of action" are often used interchangeably, which tends to create confusion in discussing res judicata. When it is said that res judicata prevents the same claim or cause of action from being litigated more than once, the intended reference is often to the factual predicate surrounding the transaction or occurrence giving rise to a lawsuit, not the legal theory upon which a litigant relies. See Expert Electric, Inc. v. Levine, 554 F.2d 1227, 1234 (2d Cir.), cert. denied, 434 U.S. 903 (1977). In an effort to avoid such confusion, this Court will use the word "claim" to denote a legal theory (e.g. a Title VII claim) and the term "cause of action" to denote the underlying facts giving rise to a legal claim or claims.

Federal Practice ¶0.405[1] (2d ed. 1991). Such a judgment precludes the parties from relitigating issues that were or could have been raised in an earlier action. See Allen v. McCurry, 449 U.S. 90, 94 (1980). "Spurred by considerations of judicial economy, and a public policy that favored injecting certainty into the legal system, the doctrine of res judicata, judicial in origin, was established for the primary purpose of avoiding repetitive litigation of the same causes of action." Expert Electric, Inc. v. Levine, supra at footnote 1, at 1232.

Clearly, both the plaintiff and Dunlop were parties to Woods I. Woods I will therefore be res judicata to the instant case if the same cause of action was sued upon in both cases (bearing in mind the linguistic caveat of footnote 1, supra), if Woods I was dismissed on the merits and if the plaintiff could have raised her Title VII claim in Woods I.

As already suggested, res judicata bars a plaintiff from raising different

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legal theories in successive lawsuits arising from the same transaction or occurrence. See Expert Electric, Inc. v. Levine, supra, at 1234; Berlitz Schools of Languages v. Everest House, 619 F.2d 211, 215 (2d Cir. 1980). Thus, whatever legal theory is advanced, when successive lawsuits are based upon substantially the same factual predicate, the suits are duplicative for purposes of res judicata.

In the instant case, Dunlop argues that the plaintiff has brought two suits raising different legal theories out of one factual predicate -- the termination of her employment. The plaintiff disagrees; in her view Woods I challenged alleged defects in the arbitral process while the present case arises from alleged acts of racial and sexual discrimination. The plaintiff's argument overlooks the presence in Woods I of her claim against Dunlop that she was wrongfully discharged without just cause, in violation of the cba. Thus, the plaintiff had placed

Dunlop's activities vis-a-vis her termination from employment "in play" in Woods I. Inasmuch as the factual predicate underlying the plaintiff's legal claims against Dunlop in Woods I included her termination from employment, this Court concludes that the plaintiff has brought two federal court cases based on the same cause of action. Thus, res judicata will bar the instant action if Woods I was dismissed on the merits and the plaintiff could have raised her Title VII claim therein.

The defendants in Woods I were granted summary judgment pursuant to Fed.R.Civ.P. rule 56. See Memorandum and Order dated June 22, 1988) in CIV-85-1464E. This Court held therein that the plaintiff had not demonstrated a breakdown in the arbitral process sufficient to support her breach of duty of fair representation claim against the union. Id., pp. 7-9. Also, inasmuch as a demonstration that a union breached its duty of fair representation in "an indispensable

predicate" to a section 301 action against an employer for breach of a cba -- see United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 62 (1981) --, this Court granted Dunlop summary judgment. The "indispensable predicate" of showing a breach of duty by the union is an essential element of and part of the merits of a section 301 claim against an employer. As the United States Supreme Court has held of LMRA section 301 actions: "[t]o prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 470-571 (1976). Such requirement embodies the long-standing federal policy of deference to arbitration in labor disputes. To hold that a showing of a breach of duty by the union is a mere technicality and not part of the merits of a section 301 claim against an employer, would undermine "the

grievance machinery [which] is at the very heart of the system of industrial self-government." Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960). This Court accordingly concludes that Woods I was dismissed on the merits as a whole and, in particular, was dismissed on the merits as against Dunlop for the plaintiff's failure to make out an essential element of her case, the breach of duty by the union

The foregoing considered, the instant action will be barred by res judicata if the plaintiff could have raised her Title VII claim in Woods I. The plaintiff argues that she could not have, because she did not know the DHR's determination until August 3, 1988, several weeks after Woods I had been dismissed, and did not receive a right-to-sue letter from the EEOC until November 21, 1990. See Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment (filed August 12, 1991), p. 15. It is true that a right-to-sue letter is a jurisdictional

prerequisite to a Title VII suit. See Sheehan v. Purolator Courier Corp., 676 F.2d 877, 881 (2d Cir. 1981); Hall v. N.Y.S. Dept. of Environmental Conservation, 726 F.Supp. 386 (N.D.N.Y. 1989). However, the plaintiff could have requested such a letter from the EEOC 180 days after her July 31, 1985 filing of charges with that agency. See 29 C.F.R. §1601.28(a); 2 Arthur Larson & Lex K. Larson, Employment Discrimination §48.32c) (1991). Thus, the plaintiff could have obtained the letter very early in 1986 and amended her complaint in Woods I, which had only been filed December 4, 1985, to include a Title VII claim. See Langston v. Insurance Co. of North America, 827 F.2d 1044, 1048 (5th Cir. 1987) (per curiam adopting District Court opinion) (res judicata imposed upon a plaintiff who could have amended complaint to assert age discrimination claim in prior action by virtue of having received EEOC right-to-sue letter three months prior to dismissal of prior action). Barring some

extraordinary circumstance, this Court would have allowed the plaintiff to add a Title VII claim in Woods I in consonance with the direction of Fed.R.Civ.P. rule 15(a) that leave to amend shall be freely granted when justice so requires. The plaintiff could have moved to amend her complaint in Woods I anytime between January 27, 1986 (180 days after filing charges with the EEOC July 31, 1985 and June 22, 1988, when the action was dismissed. This Court concludes that the plaintiff could have raised Title VII claim in Woods I and that ll prerequisites to the application of res judicata have been met.

The plaintiff further argues, however that as a matter of policy, res judicata ought not to act as a bar to Title VII actions. In this regard, heavy reliance is placed on Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), wherein the United States Supreme Court held:

"*** that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory

employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII." Id., at 59-60.

Such decision, however, held only that the findings of an arbitrator acting pursuant to a collective bargaining agreement are not binding in a subsequent Title VII action in federal court. In so holding, the Court noted that "[t]he purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal" -- id., at 56 -- and that "[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII." Ibid. Such concerns are not faced in the instant case; to hold that the plaintiff should have pursued her rights under Title VII earlier is

not to say that they needed to have been considered as part of the grievance-arbitration process, but rather that they could have been raised and considered by this Court as part of Woods I. Alexander v. Gardner-Denver Co., supra, is therefore inapposite.

The plaintiff also cites Lombard v. Board of Education of City of New York, 502 F.2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975), a case in which a proceeding under Article 78 of New York's Civil Practice Law and Rules was held not to be res judicata to a subsequent federal court action under 42 U.S. §1983. Such decision was based in part on a desire to avoid compelling plaintiffs to raise federal constitutional issues in state court. considering again that the plaintiff has brought two actions in this Court, such factor is not here present and the case is, like Alexander v. Gardner-Denver Co., supra, inapposite.

Moreover, this Court has not been presented with and has not in its own investigation of the law uncovered any

case in which a plaintiff instituted successive federal court actions pursuant to section 301 of the LMRA and Title VII. Absent controlling authority to the contrary, this Court perceives no reason why the doctrine of res judicata should not apply to the facts herein, barring the instant action.

Accordingly, it is hereby **ORDERED** that Dunlop's motion for summary judgment is granted pursuant to Fed.R.Civ.P. rule 56.

DATED: Buffalo, N.Y.
January 13, 1992

/s/
U.S.D.J.

MANDATE

United State Court of Appeals
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Court in the City of New York, on the 11th day of August, one thousand nine hundred and ninety-two.

Present: HON. ROGER J. MINER,
HON. JOHN M. WALKER,
HON. PAUL H. RONEY,*

Circuit Judges.

LUCILLE QUALLS WOODS,

Plaintiff-Appellant,

-against-

DUNLOP TIRE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LUCILLE QUALLS WOODS,

Plaintiff

JUDGMENT IN A CIVIL CASE

v.

CASE NO. Civ 91-98E

DUNLOP TIRE CORPORATION,

Defendant.

Jury Verdict. This action came before the Court for a trial by Jury. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's motion for summary judgment be granted and action is dismissed pursuant to FRCP Rule 56.

January 23, 1992
Date

/s/ RODNEY C. EARLY
Clerk

/s/
(by) Deputy Clerk

District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH, Clerk
By:
/s/Arthur Heller,
Arthur Heller, Deputy Clerk

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U.S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LUCILLE QUALLS WOODS

Plaintiff

COMPLAINT

-against-

DUNLOP TIRE CORPORATION

Defendant

Comes now Plaintiff, by and through her counsel, JAMES P. DAVIS, ESQ., and alleges the following:

COUNT I

1. Plaintiff is a black female of Afro-American origin and decent. Plaintiff's race is black. Plaintiff's address is 143 Longview Avenue, in the City of Buffalo, County of Erie and State of New York. Plaintiff is a Citizen of the United States of America.

2. Defendant DUNLOP TIRE CORPORATION, Located at 27611 Long Road, in the Town of Grand Island, County of Erie and State of New York, is a domestic corporation, is doing

business in New York State and in interstate commerce as a Manufacturer of Tires and related products.

3. At all time hereinafter relevant Defendant was an "Employer" as defined by § 701(b) of Title VII of the Civil Rights Act of 1864, 42 U.S.C. § 2000e-(b), and is thus covered by and subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

4. This Court has jurisdiction to hear and resolve this complaint by virtue of § 706 (f) (3) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a) (i) § 2000e-5 (f)(3), and 28 U.S.C. §§ 1331 and 1342 (a) (3) and (4).

5. The proper venue of this action is in this Court. Plaintiff has worked in this State and district. The discriminatory act is, actions or omission occurred within this State and district as required by 42 U.S.C. § 2000e-5, (f) (3).

6. Plaintiff has satisfied all of the procedural and administrative requirements set forth in § 706 of

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, in particular:

a. Plaintiff filed a timely written charge of discrimination with appropriate state fair employment practice agencies; viz., the New York State Division of Human Rights.

b. Plaintiff filed a timely written charge of discrimination with the United States Equal Employment Opportunity commission.

c. Plaintiff received a "Notice of Right to Sue" from the Equal Employment Opportunity Commission.

d. The complaint herein was filed with this court within 90 days from the receipt of the "Notice of Right to Sue" set forth in Paragraph 6 (c) hereinabove.

7. On or about March 22, 1976, up to and including July 9, 1985, Plaintiff was employed by Defendant in Department #237 in the position of sorter and in various other positions.

8. Plaintiff was unlawfully terminated on or about July 9, 1985 on

the basis of constitutionally inform, discriminatory employment policies and practices as applied to Plaintiff. Plaintiff was terminated from her employment by Defendant because of her race--Black and her sex--female.

9. Plaintiff was illegally terminated and discharged on the basis of her race and her sex though she had seniority rights to bump seven (7_ persons from any of four (4) available vacancies. Further, two caucasian females with less seniority than Plaintiff and with less than three years seniority worked in tire inspections. Still further, five (5) males with less seniority than Plaintiff and with less than three years seniority worked in Departments 170, 201, 206, 208 and 241.

10. Plaintiff was amply qualified for any and all of the available positions held by the two caucasian females and the five males. For example, the male in Department 170 who could have been bumped by Plaintiff was a forklift operator. This particular

position did not involve manual lifting, and Plaintiff is a licensed driver.

11. Though Plaintiff had more seniority and was qualified for other positions in all respects, including that of forklift operator, Defendant did not attempt to have Plaintiff bump any of the males or the two caucasian females. Plaintiff was instead terminated in contravention of Federal Constitutional and statutory law on the basis of her race and sex.

12. Plaintiff has suffered and will continue to suffer irreparable injury caused by Defendant's illegal conduct.

WHEREFORE, Plaintiff respectfully involves the remedial powers of this Court as provided in Title VII of the Civil Rights Act of 1964, as amended, and prays for the following:

a. Defendant be permanently enjoined from discriminating against Plaintiff on any basis forbidden by Title VII of the Civil Rights Act of 1964, as amended.

b. Defendant be ordered to rehire Plaintiff into the position from which she was illegally terminated, or in a position similar to the on for which Plaintiff had seniority or bumping rights, with full salary seniority, and benefits running from the date of termination--namely July 9, 1985.

c. Defendant be ordered to compensate, reimburse, and make whole the Plaintiff for all the lost wages and benefits Plaintiff would have received had it not been for Defendant's illegal action including, but not limited to: pay, benefits, training, promotions, seniority and pension/retirement Plaintiff should be accorded said benefits illegally lost from the date of Plaintiff's illegal termination until the date Plaintiff is tendered substantially equivalent employment, with interest on the above lost amounts to the date of payment.

d. The Court grant such further and additional equitable relief as in proper and just under all of the circumstances of this case.

e. The Court award to Plaintiff the costs and expenses of this action and award to Plaintiff a reasonable attorney's fee as provided in § 706 (k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k).

COUNT 2

Plaintiff hereby restates and re-alleges all of the statements made in Count 1, paragraphs "1" through "12" inclusive of this Complaint with the same force and effect as if the same were set forth at length herein. In addition to, and more particularly, Plaintiff alleges and states following.

13. On or about March 22, 1976 Plaintiff was employed by Defendant.

14. As of July 9, 1985, Plaintiff had worked at Defendant's plant for a period of nine (9) years and four (4) months. That Plaintiff's retirement benefits would have vested in ten (10) years or within eight (8) months of July 9, 1985.

15. Plaintiff had been employed in various positions by Defendant from March 22, 1976 to July 9, 1985.

16. Plaintiff was discharged by Defendant on or about July 9, 1985.

17. The discharge of Plaintiff by Defendant was because of Plaintiff's sex, race, and color.

18. Plaintiff was terminated and illegally discharged on the basis of race, sex and color even though she had seniority right to bump seven (7) persons from any of four (4) available vacancies. More specifically, two caucasian females with less seniority than Plaintiff and with less than three years seniority worked in tire inspection. Further, five (5) males with less seniority than Plaintiff and with less than three years seniority worked in Departments 170, 301, 206, 208 and 241.

19. Plaintiff was more than adequately qualified for any and all of the available positions held by the two caucasian females and five males. The only difference between Plaintiff and

the two caucasian females, upon information and belief, is that she needed to remain just eight (8) months more on the job before her pension vested.

20. Plaintiff, due to her seniority and bumping rights, could have bumped either one of the two caucasian females or any one of the five (5) males. One of the males was employed in Department 170 as forklift operator. The forklift operator position did not involve manual lifting, and Plaintiff is a licensed driver.

21. Though Plaintiff had more seniority, was just eight months from her pension vesting, and was qualified for other positions in all respects, including that of forklift operator. Defendant did not attempt to have Plaintiff bump any of the male or the two caucasian females. Plaintiff was instead terminated.

22. The termination of Plaintiff just eight (8) months before the vesting of her pension, though she had seniority and bumping rights, has an

unjustified adverse impact on persons of Plaintiff's race (black), and thus constitutes illegal discrimination because of race as proscribed in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

23. The reason Defendant rejected Plaintiff for any of the available positions, for which she qualified, was not because Plaintiff was incapable of performing the job but because of her race (black), in violation of the Civil Rights Acto of 1964 as amended.

24. The violation of the Title VII's proscription of racial discrimination by Defendant was willful, if not malicious, given the fact that Plaintiff's pension would have vested just eight (8) months before she was illegally terminated.

25. Plaintiff was injured by Defendant's illegal conduct, including, but not limited to, the loss of wages; loss of seniority; loss of pension; loss of benefits; and denial of experience and training flowing from Defendant's illegal actions.

26. This Court has jurisdiction to hear and resolve this complaint by virtue of §706 (f) (3) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5 (f) (3), and 28 U.S.C. §§ 1331 and 1343 (a) (4).

27. The proper venue of this action is in this Court as plaintiff was employed in this State and District, the illegal discriminatory acts occurred within this State and district as required by 42 U.S.C. § 2000e-5 (f) (3).

28. Plaintiff has suffered and will continue to suffer irreparable injury caused by defendant's illegal conduct.

WHEREFORE, plaintiff respectfully invokes the remedial powers of this Court as provided in §§ 706 (g) and 706 (k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(g) and (k), and prays for the following:

a. Defendant be permanently enjoined from discriminating against plaintiff on any basis forbidden by Title VII of the Civil Rights Act of 1964.

b. Defendant be ordered to rehire the plaintiff into the same position in Department 235 (or 237), or into a position substantially similar to the one for which plaintiff was qualified and in which she had seniority and bumping rights on July 9, 1985, with full salary, seniority and benefits running from that date.

c. Defendant be ordered to compensate, reimburse, and make whole the plaintiff for all benefits plaintiff would have received had it not been for Defendant's illegal action, including, but not limited to: pay, pension/retirement benefits, promotions and seniority. Plaintiff should be accorded any and all benefits illegally withheld from her or lost from the date of Plaintiff's illegal termination, with interest on the above withheld amounts to the date of payments, viz, $90,000.00.

d. The Court grant such further and additional equitable relief as is proper and just under all of the circumstances of this case.

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e. Plaintiff prays that the court award to Plaintiff the costs and expenses of this action and award to Plaintiff a reasonable attorney's fee as provided in §706 (k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5 (k).

DATED: February 18, 1991
Buffalo, New York

Respectfully submitted,

/s/ JAMES P. DAVIS
JAMES P. DAVIS
Attorney for Plaintiff
OFFICE & P.O. ADDRESS
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(716) 884-2606

PLAINTIFF
LUCILLE QUALLS WOODS
143 Longview Avenue
Buffalo, NY 14211

DEFENDANT
DUNLOP TIRE CORPORATION
27611 Long Road
Grand Island, New York

IN THE UNITED STATED DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LUCILLE QUALLS WOODS,

Plaintiff, Civil Action No. CIV-91-0098E

v.

DUNLOP TIRE CORPORATION,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NOW COMES Defendant and submits this Memorandum in Support of its Motion for Summary Judgment.

STATEMENT OF THE CASE

This is the second time Plaintiff has been before this Court to contest her release from Defendant's employment. In her first action (hereinafter "Woods I"), Plaintiff sued Defendant pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. §185, claiming, inter alia, that Defendant discharged her without just cause in violation of the collective bargaining agreement between it and its co-defendant in that case, United Rubber, Cork,

Linoleum and Plastic Workers of America, Local # 135. Civil Action No. 85-1464E, Complaint, ¶¶ 5-7, Exhibit 1 to Andrews Affidavit, attached as Exhibit B to Notice of Motion and Motion for Summary Judgment (hereinafter "Andrews Affidavit"). She sought reinstatement and damages for lost wages and benefits. Id. at Prayer for Relief. By Order dated June 22, 1988, this Court entered summary judgment against Plaintiff and dismissed her action. Exhibit 2 to Andrews Affidavit. Having lost Woods I, Plaintiff has instituted the present suit against Defendant (hereinafter "Woods II"), claiming that Defendant discharged her because of her race and/or sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. Complaint, ¶¶ 8, 11, 16-17, 22-23.[1] As in Woods I, she is seeking reinstatement and damages for lost wages and benefits. Id. at

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[1]Though Woods II contains two counts, both counts allege that Plaintiff was wrongfully discharged in violation of Title VII. Id.

Prayers for Relief. Because Woods I is res judicata as to Woods II, Defendant respectfully requests the Court to dismiss the present action on this basis.[2]

ARGUMENT AND CITATION OF AUTHORITIES

Res judicata, a judicially created doctrine, was established for the primary purpose of preventing repetitive litigation of the same causes of action so as to relieve parties of the cost and vexation of multiple lawsuits and conserve judicial resources. Allen v. McCurry, 449 U.S. 90, 94 (1980); Expert Electric, Inc. v. Levine, 554 F.2d 1227, 1232 (2d Cir.), cert. denied, 434 U.S. 903 (1977). Under this doctrine, a final judgment on the merits of an action precludes the parties from "relitigating issues that were or could

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[2]Pursuant to the Court's directive during the June 11, 1991 scheduling conference, Defendant is moving for summary judgment solely on this basis at this time. Should the present motion be denied, the merits and other procedural flaws of the action will be addressed in a separate dispositive motion to be filed following the close of discovery.

have been raised in that action." Allen, 449 U.S. at 94. That a particular issue was not determined in the first proceeding is of no consequence. Res judicata is an absolute bar "not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.'" Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 378 (1940) (citations omitted). As stated by one court:

> That the issue presented here was never decided in the former case does not signify; according to general theories of judicial estoppel to which "federal courts have traditionally adhered," it is black-letter law that res judicata, by contrast to narrower doctrines of issue preclusion, bars all claims that were or could have been advanced in support of the cause of action on not merely those that were adjudicated. And it is equally settled that one who has a choice of

> more than one remedy for a given wrong, ... may not assert them serially, in successive actions, but must advance all at once on pain of bar.

Nilsen v. City of Moss Point, 701 F.2d 556, 560 (5th Cir. 1983) (en banc) (citations omitted) (emphasis in original).

In the present case, there is no disputing that this Court rendered a final judgment on the merits in Woods I, which involved the same parties herein. Nor is there any real disputing that the claims presented in this action are based upon the same cause of action as that previously litigated. The determination of whether claims are duplicative for res judicata purposes "hinges upon the factual predicate of the several claims asserted." Berlitz Schools of Languages of America, Inc. v. Everest House, 619 F.2d 211, 215 (2d Cir. 1980). "[W]hatever legal theory is advanced, when the factual predicate upon which claims are based are substantially identical, the claims are

deemed to be duplicative." Id. "[I]t is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies." Expert Electric, Inc., 554 F.2d at 1234. Res judicata "precludes raising any claim arising from facts substantially identical to those pled in a prior lawsuit that has been concluded by a final judgment." Estate of Young v. Williams, 810 F.2d 363, 365 (2d Cir. 1987). "A new transformation." Frost v. Bankers Commercial Corp., 194 F.2d 505, 507 (2d Cir. 1952).

The heart of the dispute in both suits, Woods I and II, is Plaintiff's termination from employment. The right asserted in relief sought in both is reinstatement and damages for lost wages and benefits. The underlying facts involved and contested in both is substantially the same; that is, whether Plaintiff, due to her employment history and physical limitations, was qualified for her job

or for transfer to another. J.R. Dabrowski Affidavit, ¶¶1-20, submitted in support of Defendant's Motion for summary Judgment in Woods I, Exhibit 3 to Andrews Affidavit; Complaint, ¶¶ 9-11, 18-21, 23. In both suits, Plaintiff is contending that this inquiry must be answered in the affirmative and therefore, Defendant's termination of her employment was in contravention of the collective bargaining agreement in Woods I and in contravention of Title VII in Woods II. Id.; September 22, 988 Order at 5-6 in Civil Action No. 85-1464E, Exhibit 2 to Andrews Affidavit. Quite clearly, Plaintiff's Title VII claims are merely an alternative theory of recovery for her release from Defendant's employment[3] Accordingly, these claims

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[3]to be sure, had Plaintiff prevailed in Woods I, the issues presented in Woods II would not be moot. See e.g. Powell v. McCormack, 395 U.S. 486, 496 (1969) (the doctrine of mootness requires courts to dismiss cases where "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome"); County of Los Angeles v.

are duplicative under res judicata principles. As explained by the Restatement (Second) of Judgments:

> The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variation in the evidence needed to support the theories of rights. The transaction is the basis of the litigative unit or entity -- which may not be split....That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of facts, or would emphasize different

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Davis, 440 U.S. 635, 631 (1979) (where "interim relief or events have completely and irrevocably eradicated the effects of [an] alleged violation" of law, a case is moot).

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> elements of the facts or would call for different measures of liability or different kinds of relief....

Comment (c) to § 24 of Restatement (Second) of Judgments. See also Capraro v. Tilcon Gammino, Inc., 751 F.2d 56 (1st Cir. 1985) (res judicata bars age discrimination action where the plaintiffs brought previous action against employer and union alleging that the defendants refused to employ them pursuant to a conspiracy in violation of the contract and union's duty of good faith and fair dealing, which was dismissed with prejudice on a voluntary stipulation of dismissal, since both actions concern "failure to employ"; it makes no difference that the second action relies on a statute, the ADEA, not relied on in the first); Miller v. United States Postal Service, 825 F.2d 62 (5th Cir. 1987) (prior sex discrimination action, which was dismissed after the court granted the defendant summary judgment on procedural grounds, barred subsequent handicap discrimination action where

handicap lawsuit involved the same parties and sought to remedy the same wrong, i.e., the plaintiff's dismissal from employment, as the earlier sex discrimination suit); Ray v. Tennessee Valley Authority, 677 F.2d 828 (11th Cir. 1982), cert. denied, 459 U.S. 1147 (1983) (prior suit in which the plaintiff sought review of Civil Services Commission's decision upholding his discharge barred subsequent suit for breach of contract and violation of reemployment rights under the Veteran's Preference Act since primary right at issue in each suit was the plaintiff's right of continued employment); Headley v. Bacon, 668 F. Supp. 1315 (D. Neb. 1986), vacated on other grounds, 828 F.2d 1279, 1280 (8th Cir. 1987) (cause of action under Title VII for sexual harassment, retaliation and constructive discharge is identical for purposes of res judicata as cause of action under 42 U.S.C. §§ 1982 and 1983 for violating rights of free speech, equal protection and due process, where

both actions arose out of a common nucleus of operative facts; the plaintiff's second action is advancing different legal theories or "harms", not distinct claims or "wrongs"; court of appeals expressly agreed with this finding).

Without a doubt, Woods I and Woods II are successive actions arising out of the same transaction or wrong. Indeed, the same discharge. Nonetheless, Plaintiff, who controlled the tactical decision, made no attempt to include her Title VII theory of recovery in Woods I. That she could have done so is readily apparent. She was aware of her Title VII claim as early as July 31, 1985, when she filed her charge of discrimination with the EEOC. Exhibit 4 to Andrews Affidavit. Woods I was not dismissed until June 22, 1988, almost three years later. This court, having jurisdiction over Title VII claims, could have resolved her race and sex discrimination claims during Woods I. 42 U.S.C. § 2000e-5.

Instead, Plaintiff chose to await the resolution of Woods I before requesting her right to sue and initiating her discrimination action.[4] Such is exactly the sort of claim splitting the doctrine of res judicata forbids. See e.g. Bailey v. USX Corp., 658 F. Supp. 279 (N.D. Ala. 1987), aff'd 850 F.2d 1506 (11th Cir. 1988) (plaintiff who could have requested right to sue and amended complaint to assert claim, which grew out of earlier claim that was the subject of pending action, barred by res judicata from pursuing claim in subsequent lawsuit); Langston v. Insurance Company of North America, 827 F.2d 1044 (5th Cir. 1987) (plaintiff who could have, by amendment or consolidation, advanced his age

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[4]In fact, Plaintiff could have raised her discrimination claims by January 27, 1986 (180 days after filing her EEOC charge), less than two months after Woods I was filed. 42 U.S.C. §2000e-16(c) (after 180 days from the filing of the charge, the employee may file a civil action); Fed. R. Civ. Proc. 15(a) (leave to amend shall be freely given when justice so requires).

discrimination allegation during earlier wrongful termination action barred from pursing age claims in second action); Miller, 825 F.2d at 62 (exhaustion requirement did not prevent plaintiff from raising handicap discrimination claim in earlier proceeding since he could have raised claim following 180 day administrative processing period; accordingly, claim barred by res judicata principles). Simply put, Plaintiff could have raised the discrimination issues during the pendency of Woods I, and her failure to do so, for whatever reason, precludes her from raising these claims now.

CONCLUSION

For the foregoing reasons and because the undisputed facts reveal that Defendant is entitle to judgment as a matter of law, Defendant respectfully requests the Court to dismiss the present action in its entirety pursuant

to Rule 56 of the Federal Rules of Civil Procedure.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LUCILLE Q. WOODS

Plaintiff

CIVIL ACTION NO.
CIV-91-0098E

vs.

DUNLOP TIRE CORPORATION

Defendant

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

This memorandum of law is submitted in opposition to defendant DUNLOP TIRE CORPORATION's application for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment in favor of the defendant and against the answering plaintiff LUCILLE Q. WOODS.

STATEMENT OF FACTS

The facts herein relevant are fully set forth in the plaintiff's affidavit, annexed hereto as Exhibit ____.

ISSUE

Whether there exists a genuine or triable issue as to any material facts.

L A W

I. SUMMARY JUDGMENT SHOULD BE GRANTED ONLY WHERE THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT.

A. There Exists a Genuine Issue As to Material Facts.

Summary judgment should not be granted lightly. This procedural weapon is a drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury. Donelly v. Guion, 467 F.2d 290, 291 (2d Cir. 1972).

In Heyman v. Commerce & Industry Insurance Company, 524 F.2d 1317 (2d Cir. 1975), cited about 700 times, the Court stated that:

> "Although summary judgment under Federal Rules of Civil Procedure 56 can be a valuable tool for disposing of vexatious litigation and promoting prompt disposition of cases,... it must be used selectively if we are to avoid trial by affidavit." 524 F.2d at 1322 (citations omitted).

The instant case is precisely the type of case, given the clash of constitutional remedies, that should not be "tried by affidavit." Here, on July 31, 1985, the plaintiff, a black female, filed a complaint with the Equal Opportunity Employment Commission (EEOC), the Federal Agency responsible for the administration of Title VII, 42 U.S.C. SS 2000e-2 et seq. The principal

purpose of Title VII is to carry out the Congressional mandate of the elimination of discrimination in employment.

On the very same day, July 31, 1985, plaintiff cross-filed her formal complaint against Dunlop Tire Corporation (Dunlop) with the New York State Division for Human Rights (NYSDHR). The joint investigation and cooperation of these two investigatory agencies, one Federal and the other State, was very thorough and culminated in a determination of probable cause that her allegations of racial and sexual discrimination were true. This determination was issued on August 3, 1988. However, the Memorandum and Order (in CIV-85-1464E: "Woods I") was handed down to July 27, 1988; that is, twelve (12) days before the NYSDHR issued its

determination of probable cause. Hence, she could not have amended her "Woods I" Complaint to add the Title VII Cause of Action.

In light of the foregoing there clearly exists probable cause that Dunlop has discriminated against plaintiff in her employment. There clearly exists a genuine issue as to a material fact. Despite the rising tendency to subject Civil Rights actions to the test of summary judgment early in the legal proceedings, the "fundamental maxim" remains that on a motion for summary judgment the Court cannot try issues of fact; it can only determine whether there are issues to be tried. Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317, 1319, 1320 (2d Cir. 1975), and cases cited therein.

Moreover, when the court considers a motion for summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed, 2d 176 (1962), with the burden on the moving party to demonstrate the absence of any material factual issue genuinely in dispute, Adickes v. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed. 2d 142 (1970).

In this particular case the foregoing rule is clearly applicable. Given the res judicata effect of summary judgment, as the Court reasoned in Judge v. City of Buffalo, 524 F.2d 1321 (2d Cir. 1975), when it reversed a grant of

summary judgment for the defendant-employer in a discrimination case, "the (plaintiff) must be afforded an opportunity of a trial at which he may present evidence in support of his contention. ..." Id., at 1323.

Consequently, there exists a genuine issue as to material facts on which the defendant is not entitled to judgment as a matter of law.

B. Plaintiff Has Made Out a Prima Facie Case and Has a Meritorious Claim.

Plaintiff's action in "Woods II" was brought under Title VII of the Civil Rights Act of 1964 as amended by 42 USC SS 2000e, et seq. That statute provides that:

> "It shall be an unlawful employment practice for an employer -

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."

More specifically, it is established that a plaintiff in an employment discrimination case...

> has the burden (first) of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, non-discriminatory reason for the employee's rejection.' Third, should the defendant carry his burden, the plaintiff must then

> have an opportunity to prove by a preponderance of the evidence that the defendant's reasons were not its true reasons, but were a pretext for discrimination."

Texas Department of Community Aggairs -v- Burdine, 450 U.S. 248, 252-53 (1981) (quoting McDonnell Douglas Corp. -v- Green, 411 U.S. 792, 802 (1973).

In order to establish a prima facie case of racial discrimination in violation of Title VII, the plaintiff must show (1) that she belongs to a protected class, (2) that she was qualified for the position, (3) that she was discharged, and (4) that her discharge occurred "in circumstances giving rise to an inference of racial discrimination." Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1188 (2d Cir. 1987); See Meiri v. Dacon, 759 F.2d 989

(2d Cir. 1985) (religious discrimination under 42 USC Section 2000e et seq.) cf. Pena v. Brattleboro Retreat, 702 F.2d 322, 324 (2d Cir. 1983) (age discrimination claim under 29 U.S.C. Sections 621-634 (1975, Supp. IV 1980 & Supp. V 1981).

In light of the foregoing requirements, the Court could infer from the allegations of discrimination made by plaintiff, a black female, relative to disparate treatment, constitutionally impermissible pretextual discharge just eight (8) months before vesting of her retirement/ pension (i.e., a property and liberty interest), applied with an evil eye, and the invidious treatment resulting in a determination of probable cause by the NYSDHR, which findings of fact were concurred in by the EEOC, though she had

worked at Dunlop more than nine years and though shw was not allowed to "bump" junior Caucasian males and Caucasian females who occupied positions that plaintiff could have "bumped" into.

The question to pose at this juncture is "why did Dunlop discharge plaintiff just eight months before her retirement/pension vested?" plaintiff can establish at trial that she was targeted for dismissal by management to deny her, her retirement/pension. The evidence will show that her performance was as good, if not better than, that of many of the younger Caucasian males and females, all of whom had less seniority than plaintiff. If established at trial, this evidence (i.e., a genuine issue of fact)

could reasonably convince a trier of fact that the proffered reason for plaintiff's dismissal was pretextual.

Rule 56 does not require that plaintiff prove each element of her case at this juncture or suffer summary judgment. In assessing the various inferences, the Court must be alert to the fact that "employers are rarely so cooperative as to include a notation in the personnel file "that the pretextual discharge or impermissible action just eight (8) months before vesting of her retirement/pension is for a reason expressly forbidden in law. Thornbrough vs. Columbus & Greenville Railroad Co., 760 F.2d 633, 638 (5th Cir. 1985);

cf. Robinson vs. 12 Lofts Realty, Inc., 610 F.2d 1032, 1043 (2d Cir. 1979) ("Clever men may easily conceal their motivations") (quoting United States vs. City of Black Jack, 508 F.2d 1179, 11985 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

Consequently, given the foregoing property and liberty interest in plaintiff's nine years and four months at Dunlop, given the manner in which these constitutionally protected rights were pretextually invaded, and without full procedural and substantive due process, given the findings and probable cause determination by the investigatory agencies, plaintiff has and can demonstrate that she has a meritorious

claim. If so, a summary judgment motion should not lie because there exists a genuine issue as to material facts and the defendant is not entitled to a judgment as a matter of law.

II. RES JUDICATA DOES NOT APPLY WHERE THE NEW YORK STATE DIVISION OF HUMAN RIGHTS AND THE EQUAL OPPORTUNITY EMPLOYMENT COMMISSION HAVE FOUND PROBABLE CAUSE TO BELIEVE THAT PLAINTIFF HAD BEEN A VICTIM OF DISCRIMINATION.

A. "Res Judicata" is Inapplicable in this Case.

"Res Judicata" is a term which has been given a good many different meanings. Current usage gives it a broad meaning which covers all the various ways in which a judgment in one action will have a binding effect in another. It also includes what has come to

be known as collateral estoppel: the effect of a former judgment in a later action based upon a different claim or demand. See Lawlor vs. National Screen Service Corp., 349 U.S. 322, 326, 85 S.Ct. 865, 867, 99 L.Ed. 1122, 1126-1127 (1955). Probably the most famours formulation of the distinction was made by Justice Field in Cromwell vs. County of Sac, 94 U.S. 351, 24 L. Ed 195 (19876):

> "In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. ... Such demand or claim, having passed into judgment, cannot again be brought

> into litigation between the parties in proceedings at law upon any ground whatever.
>
> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. 94 US at 352-353, 24 L.Ed. at 197-198."

No matter which view of "res judicata" is more elucidating, that of Cromwell (citation omitted) or that of Allen v. McCurry, (449 U.S. 90,94), it is a basic principle of preclusion doctrine that a decision in one judicial proceeding cannot bar a subsequent suit raising issues that were not relevant to the first decision. "If the legal matters determined in the earlier case (here, "Woods I") differ from those

raised in the second case (here, "Woods II"), collateral estoppel has no bearing on the situation." Commissioner vs. Sunnen, 333 U.S. 591, 600 (1948). See also Allen vs. McCurry, 449 U.S. 90,94 (1980). In "Woods I", the District Court decided only whether the plaintiff's union had breached its duty of fair representation in violation of 29 U.S.C. Sections 185 and 301 of the Labor Management Relations Act (LMRA). In its Memorandum and Order, CIV-85-1464E, "Woods I" at pages 8-9, the Court concluded its decision with the following rationale:

> "Although it could be said that the Union might have spoken with her more frequently or at greater lentgh or done more investigating, its conduct certainly

> does not reasonably support an inference of arbitrariness or of bad faith which could lead a reasonable jury to find that the Union breached its duty of fair representation. Union representatives usually are not legally trained and can not be held to the same standards as are lawyers. This Court can not allow such a claim to survive this motion and risk opening the federal courts to any disgruntled employee unhappy with an arbitration decision, especially in light of the long-standing federal policy in favor of enforcing collective bargaining agreements and giving affect to their grievance procedures. Because the plaintiff has failed to establish the "indispensable predicate" to her section 301 claim, her Complaint must be dismissed against both the Union and Dunlop."

Even a cursory reading of the foregoing rationale reveals that "Woods I" involveda union member whohad filed a breach of a collective bargaining contract against the employer under Section 301 of the National Labor Relations Act (NLRA)

coupled with a claim charging the union with a breach of its duty of fair representation in plaintiff's arbitration hearing. Stated differently, the gravamen of the lawsuit in "Woods I", then, was "enforcement of a collective bargaining agreement" a well as plaintiff's "unhappiness with an (adverse) arbitration decision."

On facts not unsimilar to those in "Woods I", in Alexander vs. Gardner-Denver Co., 415 U.S. 36 (1974), the United States Supreme Court held that an arbitrator's finding of fact would not be given collateral estoppel or "res judicata" effect in a subsequent Title VII case.

The Ninth Circuit Court of Appeals has held that a Title VII case

is not barred even if the arbitrator's decision is contested in federal court, and the federal judge upholds the arbitration decision. Aleem v. General Felt Indus., 661 F.2d 135, 27 FEP 569 (9th Cir. 1981).

As further support, it has been uniformly held that a prior State Division for Human Rights decision adverse to the plaintiff will not be "res judicata" or collateral estoppel, barring a subsequent Title VII or Section 1981 claim. Garner vs. Giarrusso, 571 F.2d 1330, 20 FEP 1315 (5th Cir.), rehearing denied, 575 F. 2d 300 (1978) (claimant was not barred by res judicata from pursuing Title VII or Section 1981 claims after adverse ruling

from local agency). 1/

The quintessential Second Circuit case that has been followed since 1974 and is often quoted by many of the other circuits in Lombard vs. Board of Education, 502 F.2d 631 (2d Cir. 1974). There the Court held that prior state proceedings did not bar the civil rights suit on the ground of "res judicata" or collateral estoppel. That teacher

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1/ See also Battiste vs. Furnco Constr. Corp., 503 F.2d 447, 8 FEP 746 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975) (Title VII claim is actionable even after a final state administrative determination); Stewart vs. Wappingers Cent. School Dist., 437 F. Supp. 250, 23 FEP 231 (S.D.N.Y. 1977) (Section 1981 action allowed to proceed after state administrative determination); Crouch vs. UPI, 14 FEP 1047 (S.D.N.Y.1977) (prior agency action not a bar); Wageed vs. Schenuit Indus., 406 F.Supp.217, 11 FEP 1226 (D.Md 1975) (Section 1981 action allowed to be prosecuted notwithstanding prior agency disposition); Smith vs. Readers Digest Ass'n., 13 FEP 853 (SDNY 1974) (Title VII action held not barred by prior administrative ruling).

had a due process right to an evidentiary hearing before termination of his probationary employment. Relying to some extent on Monroe vs. Pape, 365 U.S. 167, 183 S.Ct. 473 (1961), the Court reasoned that "whether it is called "res judicata" or claim preclusion, we think for several reasons that policy considerations should not permit the extension of the "res judicata" doctrine in this case to issues of procedural due process which are said to raise claims under 42 U.S.C. Section 1983.[2/]

2/ Monroe vs. Pape, which authoritatively interpreted the Civil Rights Act, held that: "the federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is involved.

"Wood II" is unlike Langston, 827 F.2d 1044, where defendant-employer had prevailed on a summary judgment motion in state court during the pendency of an action in federal court based on age discrimination; or Miller, 825 F.2d 62 (5th Cir. 1987) (where prior sex discrimination action, dismissed after the Federal District Court granted defendant's summary judgment on procedural grounds, barred subsequent handicap discrimination action where action involved the same parties and sought to remedy the same wrong--the plaintiff's discharge from employment, as the prior sex discrimination suit); or Nielsen, 701 F.2d 556 (5th Cir. 1983) where plaintiff filed four successive

actions under Section 1983 and an untimely Title VII action and had suffered summary judgment twice before.

In those cases, the plaintiffs had an opportunity to raise and argue the discrimination cause of action. That is, they had a full and fair opportunity to address the constitutionally suspect act--the invidious discrimination itself. Out plaintiff did not have any such opportunity, neither in state--nor in federal court.

Here, plaintiff did not need to address the issue of racial discrimination in "Woods I". It was not necessary to the decision. "Woods I" was n the nature of an appeal of an adverse arbitration

determination. It was brought to "spank" the Union for its perfunctory and luke-warm assistance at her arbitrarion hearing. Why would it be necessary to raise Title VII issues of racial or sexual discrimination where the standards of whether the conduct breached a duty of fair representation may be different from the issue of whether there was discrimination proscribed by the employment discrimination statutes?

"Woods II" is more analogous to Alexander vs. Gardner-Denver Co., 415 U.S. 36 (1974). In Alexander a black employee of the Gardner-Denver Company was discharged because of his allegedly unacceptable work performance. The employee filed a grievance under a collective

bargaining agreement asserting that he had been wrongfully discharged and, in a subsequent step of the grievance process, he claimed that his discharge was a result of racial discrimination by the employer. Prior tothe resolution of his grievance the employee filed a Title VII claim which was forwarded to the EEOC. the arbitrator in the grievance process then determined that the employee's dismissal was "for just cause."

Subsequently, in the Title VII suit, the EEOC determined that there was no reasonable cause to believe that Title VII had been violated. Nevertheless, the employee instituted a Title VII action. Although the district court and the Tenth Circuit dismissed the

employee's suit on the ground that his claim of racial discrimination had been resolved against him by the arbitrator in the grievance procedure, the Supreme Court reversed. The Court held that an arbitration decision unfavorable to an employee who challenged his employer's discriminatory practices did not foreclose the employee's statutory right to a subsequent trial de novo under Title VII based on the same set of facts. The Court believed that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices could best be made coexistent by allowing the employee to pursue both the NLRA and Title VII processes fully. In so holding, the Court proclaimed:

> "/L/egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. In the Civil Rights Act of 1964, Congress indicated that it considered the policy against discrimination to be of the "highest priority." ...And, in general, submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a Congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing las and institutions relating to employment discrimination."

Clearly the doctrine of "res judicata" is inapplicable to "Woods II". The principle has no application to a plaintiff who files a lawsuit under Title VII after the New York State Division for Human Rights (NYSDHR) has determined probable cause that she had been the victim

of discrimination. The defendant would "torture" the doctrine of "res judicata" and have plaintiff forfeit her constitutional right of action under Title VII. This "torture" of the doctrine of "res judicata" would extend to denying plaintiff her day in court even though the statute of limitations had not run, and "Wood II" was timely filed in all respects. The defendant would further "torture" the doctrine of "res judicata" by having this court bend over backwards to subordinate constitutional rights (and the intent of Congress, in enacting Title VII) to a rigid formalistic, medieval-like concept of "res judicata". Nielsen (dissent), 701 F.2d 563 at 565.

Consequently, "Woods II" is unlike any of the cases quoted by the defendant. All of them can be distinguished in a few words. Not a single plaintiff in the quoted cases had received a determination of probable cause from the statutory federal or state agency issued after an extensive, searching and revealing investigation, tending to show beyond doubt that there existed a meritorious claim of discrimination under Title VII and that plaintiff was a victim of that discrimination.

B. "Woods II" was not "Ripe" During the Pendency of "Woods I".

A fundamental Constitutional right is worthless without a remedy. Plaintiff recites in her affidavit

at page 4, paragraph 18: 'that if there was no finding of probable cause as to racial discrimination, I would not have commenced an action against Dunlop under Title VII, as amended, 42 U.S.C. SS 2000e-2 et seq." This factual statement is one of the unique distinctions between "Woods II" and any of the cases cited by the defendant.

Here, unlike there, the plaintiff had received a favorable determination statng that it had found probable cause to believe that plaintiff had been a victim of discrimination. Does this determination bar plaintiff from filing a Title VII suit in federal district court? If the defendant responds to that query in the affirmative, plaintiff then poses the question, how could this

be when "Woods I" had already been decided (July 22, 1988) when she received the NYSDHR's determination (along with the reasons therefor) on August 3, 1988, some twelve (12) days <u>after</u> the Court's memorandum and order in "Woods I"? Plaintiff would follow up that query with still another. How could she be expected, from a logical and common-sense perspective, to include her Title VII cause of action in "Woods I" when she did not know the findings of fact (i.e., the very reasons she needed to put in her complaint) until after the decision in "Woods I"? plaintiff did not know the extent of the racial and sexual discrimination, nor the facts needed tomake out a prima facie case until she had read the findings of fact and

determination from the NYSDHR. At that time, and at no time before, she knew what to include in her complaint in "Woods II". Before august 3, 1988, she had nothing that would survive a Rule 12(b)(6) motion. Her cause of action was not "ripe" until she knew she had one and until she received the findings and determination from the agency with the statutory duty to investigate and unmask the pretextual bases for discrimination that could never be discovered by plaintiff-- a victim of an evil eye and a malevolent hand.

It has been held, in New York Gaslight Club, Inc. vs. Carey, 447 U.S. 54, 62-63 (1980), for instance, that all state "proceedings",

whether agency proceedings or state judicial review proceedings, are entitled to "substantial weight", not "preclusive effect" as urged by the defendant. "Substantial weight", then, must be given to the findings and determination of the NYSDHR in "Woods II". See EXHIBIT "C".

The existence of possible violations of the employment discrimination statutes does not preclude litigation under the labor relations statutes for violation of the duty of fair representation. Congress did not intent the exercise of rights in an unrelated matter, existing before plaintiff knew she had a cause of action in "Woods II", to foreclose a subsequent Title VII suit.

In fact, Congress intended just the opposite. First, Congress

intended that State antidiscrimination procedures be an integral part of the Nation's battle against discrimination. For that reason, Congress did not pre-empt state anti-discrimination agencies, see 110 Cong. Rec. 7216 (1964). Kremer vs. Chemical Construction Corp. (dissent), 456 U.S. 461 at 504.[3/]

Second, under 42 U.S.C. 2000e- et seq. a plaintiff may file a charge after termination of state proceedings, and the statute clearly

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3 / Kremer, supra, can be distinguished. In "Woods II", the plaintiff received a favorable determination from the NYSDHR delineating the invidious discrimination it had found through its thorough and revealing investigation. In Kremer, the plaintiff, unlike here, had received a "no probable cause" determination from the NYSDHR.

contemplates that a plaintiff may bring suit despite an adverse finding by the state agency. However, that is not our case. In our case, "Woods II", the state agency found probable cause. A fortiori, our plaintiff should be in all respects permitted to pursue her Title VII claim. A "tortured" view and application of "res judicata" should not be permitted to eviscerate the Congressional intent. In Alexander vs. Gardner-Denver Co., 415 U.S. 36 (1974), the high court permitted a Title VII suit despite a prior adverse arbitration under a collective gargaining agreement. Moreover, the Court emphasized that Congress intended a scheme of overlapping, independent, supplementary discrimination remedies:

> "Legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination... Title VII provides for consideration of employment-discrimination claims in several forums.... And, in general, submission of an action to one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statues."
> Id., at 47-48 (footnotes ommitted) (emphasis added).

Surely, it could be argued that our plaintiff has not even had her discrimination cause of action under Title VII heard in even one forum. "Woods I" was not a decision on the merits. It was merely the affirmance of an adverse arbitration award and a denial of plaintiff's unfair representation change. Under Title VII, plaintiff has a substantial

constitutional right. However, if the "tortured" gloss that the defendant has so skillfully placed on the doctrine of "res judicata", totally inapplicable here, prevails, then, plaintiff will be stuck in the proverbial trap of "a right without a remedy".

Consequently, the intent of Congress and at least four Supreme Court case,[4/] have held the federal court doors open wide enough for

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4/ The four Supreme Court cases are as follows: (1) Alexander vs. Gardner Denver Co., 4151 US 36 (1974) (Held: No collateral estoppel or "res judicata" effect in a subsequent Title VII case); (2) Johnson vs. Railway Express Agency Inc., 421 US 454 (1975) (Held: Title VII and 42 USC 1981, although related and directed to most of the same ends, provide separate, distinct, and independent discrimination remedies; (3) Chandler v. Roudebush, 425 US 840 (1976) (Permitted a federal employee to bring a Title VII suit even though the Civil Service Commission had affirmed a federal agency's rejection of the employee's discrimination

aggrieved plaintiffs such as Ms. Woods to be heard under Title VII. This is especially true where, as here, a substantial property and liberty interest is at stake--nine years and four months invested in a job with just eight (8) months to go before the vesting of her retirement/ pension. The application of an overly technical legal preclusion device should not be permitted, in equity, fairness and justice, to permit the unjust enrichment of a corporate giant like Dunlop that can use up the best years of a woman's life and kick her out with nothing on the strength

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(cont. #4/...)
claim); (4) McDonnel Douglas Corp. vs. Green, 411 US 792 (1973) (Court refused to prevent plaintiff from bringing suit in federal court because of an EEOC determination of no reasonable cause).

of "res judicata"--an inappropriate and inapplicable doctrine given all of the circumstances of this case.

CONCLUSION

For all the foregoing reasons and because plaintiff has never had a full and fair opportunity to litigate her Title VII cause of action on the merits and since there exists a genuine issue as to material facts, the defendant's motion for summary judgment should be in all respects denied and the case set down for a trial on the merits.

Respectfully submitted,

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SUPREME COURT, U.S.
FILED
DEC. 14 1992
OFFICE OF THE CLERK

(2)

No. 92-823

In The

Supreme Court of the United States

October Term, 1992

LUCILLE QUALLS WOODS,

Petitioner,

v.

DUNLOP TIRE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court below correctly rule that the well-settled principles of res judicata operate to bar a plaintiff's Title VII action where the plaintiff brought a prior action against her employer in the same federal district court on the same cause of action, which action was dismissed with prejudice pursuant to Rule 56 of the Federal Rules of Civil Procedure; where the plaintiff could have raised her Title VII claim in the earlier action or, in the alternative, could have preserved the claim raised in the earlier action and then subsequently joined it with her Title VII claim; but where the plaintiff chose instead to pursue one suit against her former employer, await the outcome of administrative proceedings, and then sue separately on her Title VII claim?

RULE 29.1 LISTING

Respondent's parent company is:

Sumitomo Rubber Industries, Ltd.

Respondent has no subsidiaries or affiliates to list pursuant to Rule 29.1.

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MISCELLANEOUS

Restatement (Second) of Judgments § 24 (1982).....5

Respondent Dunlop Tire Corporation respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Second Circuit's opinion in this case. That opinion is reported at 972 F.2d 36 (1992).

STATEMENT OF THE CASE

Respondent refers this Court to the Second Circuit's opinion reproduced at pages A-1 through A-23 of the Petition (albeit with typographical errors and some minor omissions) for an accurate statement of the facts and procedural history of this case.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-5(f)(1)

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action

against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or

> the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

REASONS WHY THE PETITION SHOULD BE DENIED

There exists no compelling reason to justify the granting of a writ of certiorari. As will be discussed below, the Court of Appeals fully considered and correctly decided the issues before it, and its decision is not in conflict with either the decisions of the United States Supreme Court or the decisions of the various circuit courts of appeals.[1]

The rule of res judicata is that "a valid, final judgment, rendered on the merits, constitutes an absolute bar

[1] Moreover, neither the decision of the Court of Appeals nor the record raises the "Question Presented" in the Petition. The Petitioner's question asserts that the court's decision works to "deny a plaintiff with a meritorious claim a full and fair opportunity to be heard" where the administrative agencies have found probable cause to believe that discrimination has occurred. First, the underlying merits of Petitioner's Title VII claim have not been ruled upon, nor did the EEOC issue a probable cause finding. Second, as discussed below, Petitioner had a full and fair opportunity to be heard on her Title VII claim; she simply did not avail herself of this opportunity.

to a subsequent action between the same parties . . . upon the same claim or demand. It operates to bind the parties both as to issues actually litigated and determined in the first suit, and as to those grounds or issues which might have been, but were not, actually raised and decided in that action." *Saylor v. Lindsley*, 391 F.2d 965, 968 (2d Cir. 1968). That a particular issue was not determined in the first proceeding is of no consequence. Res judicata is an absolute bar "not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' " *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 378 (1940) (citations omitted).

The Court of Appeals properly concluded that Petitioner's action is barred by res judicata. All of the elements of claim preclusion are inarguably present. Indeed, Petitioner does not contest the Court of Appeals' determination in this regard. Her first and second lawsuits (hereinafter *"Woods I"* and *"Woods II"*, respectively) are successive actions, pertaining to the same transaction or wrong, arising out of the same facts, seeking to vindicate the same right, and requesting the same relief. It makes no difference that Petitioner in *Woods I* charged Respondent with violating the collective bargaining agreement in discharging her and in *Woods II* is charging Respondent with violating Title VII for this same action.[2] Because the

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[2] Petitioner erroneously suggests at page 11 of her Petition that her first lawsuit involved merely a review of an adverse arbitration decision. In a hybrid section 301 action such as *Woods I*, the plaintiff must show that her discharge was contrary

factual predicate is the same, the two actions involve the same cause of action and are therefore, duplicative for res judicata purposes. *E.g., Estate of Young v. Williams*, 810 F.2d 363, 365 (2d Cir. 1987) (res judicata "precludes raising any claim arising from facts substantially identical to those pled in a prior lawsuit that has been concluded by a final judgment"); *Berlitz Schools of Languages of America, Inc. v. Everest House*, 619 F.2d 211, 215 (2d Cir. 1980) (the determination of whether claims are duplicative for res judicata purposes "hinges upon the factual predicate of the several claims asserted"); *Expert Electric, Inc. v. Levine*, 554 F.2d 1227, 1234 (2d Cir.), *cert. denied*, 434 U.S. 903 (1977) ("it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies"); *see also* Restatement (Second) of Judgments § 24, Comment (c) (1982).

Thus, as concluded by the court below, a straightforward application of the rule of res judicata bars Petitioner's action since she could have raised and resolved her Title VII claim in *Woods I*. She was aware of the claim as early as July 31, 1985, when she filed her charge of discrimination with the EEOC. *Woods I* was not dismissed until June 22, 1988, almost three years later. The district court, having jurisdiction over Title VII claims, could have resolved her discrimination claim during *Woods I*. 42

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to the contract and is therefore, entitled to relitigate the underlying merits of her claim. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 568-71 (1976). Accordingly, Petitioner was afforded a *de novo* determination on her discharge claim in *Woods I*.

U.S.C. § 2000e-5. Petitioner, however, made no attempt to include the Title VII claim in her earlier action.

Petitioner nevertheless argues, as she did before the Court of Appeals, that she should not be bound by the preclusive effect of *Woods I* because her charge of discrimination was still in the administrative process when judgment was entered in *Woods I*. As noted by the court below and conceded by Petitioner, however, Title VII's administrative exhaustion requirement did not preclude the Petitioner from raising her discrimination claim in *Woods I*. Under 42 U.S.C. § 2000e-5(f), complete exhaustion of the administrative process is not required; an aggrieved employee may file a civil action 180 days after the initiation of the administrative process. *Occidental Life Insurance Company v. EEOC*, 432 U.S. 355, 361 (1977) (a complainant may elect to circumvent the EEOC procedures and seek relief through a private enforcement action in district court after 180 days). Consequently, Petitioner could have raised her discrimination claim by January 27, 1986 – 180 days after filing her charge – less than two months after *Woods I* was filed. 42 U.S.C. § 2000e-5(f) (after 180 days from the filing of the charge, the employee may file a civil action); *Fed.R.Civ.P.* 15(a) (leave to amend shall be freely given when justice so requires); *see also Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 465 n. 3 (1982); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 458 (1975).

Petitioner has cited no authority which even marginally supports her request to be relieved of the obligations imposed on every litigant by the doctrine of res

judicata. Instead, she simply argues that a Title VII plaintiff should not be required to chose between "either leaving their charges in the administrative process, hoping in the meantime there will be no adverse judgment on other claims which will preclude their Title VII claims, or asking for a right to sue letter and abandoning the administrative mechanism in order to join all claims in a single lawsuit." Petition at 7-8. Such a choice, she claims, is inconsistent with Congress' intent in enacting Title VII.

The Court of Appeals likewise properly rejected this argument. Neither the language nor legislative history of Title VII evidences an intent to displace the traditional rules of res judicata insofar as judicial determinations are concerned. *See Kremer,* 456 U.S. at 461. In fact, there is legislative history supporting the application of res judicata to Title VII cases. *Id.* at 475-476. Hence, although Congress intended voluntary compliance to be the preferred means of resolving Title VII disputes, Congress has not demonstrated any intention to override the rules of preclusion.

Moreover, requiring a plaintiff to join all her claims in a single lawsuit is not inconsistent with Congress' intent that "recourse to the private lawsuit will be the exception and not the rule," 118 Cong. Rec. 7168 (1972), inasmuch as the obvious desire was that litigation be avoided, not resorted to twice. Furthermore, application of the normal preclusion rules to Title VII litigation will not eliminate the possibility of informal resolution of the complaint. For 180 days the state or federal agency has exclusive jurisdiction over the charge and may attempt informal resolution during that period. 42 U.S.C. § 2000e-5(f)(1). Indeed, the statutory language indicates

that Congress intended for the administrative process to be completed within the 180-day period. *See id.* Even more significant, however, is the fact that Congress provided that a court may stay proceedings in an action for up to 60 days pending the termination of state or local proceedings or "further efforts of the Commission to obtain voluntary compliance." *Id.* Apparently then, Congress contemplated the possibility of an individual initiating a private lawsuit before conclusion of the administrative process and determined that the concerns raised by Petitioner could adequately be addressed through a stay of the proceedings. There simply is no support for the proposition that application of the preclusion rules will frustrate Congressional intent or result in unnecessary litigation.

Nor, as concluded by the Court of Appeals, does Congressional preference for informal resolution of Title VII claims excuse compliance with general rules governing federal litigation. In reaching this conclusion, the court relied upon *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), *Miller v. United States Postal Service*, 825 F.2d 62 (5th Cir. 1987), and *Bailey v. USX Corporation*, 658 F.Supp. 279 (N.D. Ala. 1987), *aff'd*, 850 F.2d 1506 (11th Cir. 1988). The court also cited *Pirela v. Village of North Aurora*, 935 F.2d 909 (7th Cir.), *cert. denied*, 112 S.Ct. 587 (1991).

In *Johnson*, the Supreme Court rejected this preference for voluntary compliance as well as the same concerns raised herein by Petitioner as a basis for tolling the running of a statute of limitations. There, the plaintiff argued that the limitations period on his section 1981 claim should be tolled during the pendency of his Title VII charge in the administrative process since any other

result "would force a plaintiff into premature and expensive litigation that would destroy all chances for administrative conciliation and voluntary compliance." 421 U.S. at 465. While recognizing that such a result was conceivable, the Court nonetheless rejected the plaintiff's argument that he was entitled to special treatment because he could have protected his 1981 claim by filing timely but simply failed to do so: "We find no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each claim independently." *Id.* at 466.

The courts in *Miller* and *Bailey* each held, as did the court below, that the pendency of administrative proceedings on a charge of discrimination does not exempt a Title VII claim from the bar of res judicata. Accordingly, both of these courts precluded its respective plaintiff from pursuing his discrimination claim in a subsequent action despite the fact that the administrative agency had not completed its investigation before resolution of the plaintiff's first action. As reasoned by the court in *Bailey*, "This court does not see any Title VII philosophy, much less statutory language, which would grant [the plaintiff] an exception to the rule of res judicata." 658 F.Supp. at 281-82. Thus, the court's decision is in accord with Supreme Court precedent as well as the decisions of the various courts of appeals.

Finally, with respect to Petitioner's suggestion that she could not join her claims in one action because she was forced to bring her first action prior to the completion of the EEOC administrative process due to the six-month statute of limitations on that claim, the court properly concluded that Petitioner "had two available courses

she could have followed in order to avoid the sting of res judicata." A-20-A-21 of Petition. First, she could have filed the first action and then sought a stay in the district court pending the outcome of her Title VII administrative proceedings. Upon completion of the administrative process, she could have joined the Title VII claim with the pending claim by amending her complaint. *See Fed.R.Civ.P.* 15(a) (leave to amend "shall be freely given"). Second, Petitioner could have filed the first action, requested a right to sue notice after 180 days, and then amended the complaint to include her Title VII claim. Given that Petitioner could have, had she chosen either alternative, preserved her Title VII claim, the court correctly found that there was "no reason to excuse [Petitioner's] failure to take these minimal steps necessary to preserve each claim independently," and accordingly, concluded that her Title VII claim is not exempt from the bar of res judicata.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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